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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted] 19

ROBERT MILLER AND WILLIAM COONEY, PLAINTIFFS IN ERROR,

vs.

B. O. McCLAIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED APRIL 11, 1918.

(25,236)

(25,236)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 446.

ROBERT MILLER AND WILLIAM COONEY, PLAINTIFFS IN ERROR,

vs.

B. O. McCLAIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

No. 19549.

B. O. McClain, Appellant,

vs.

Robert L. Miller et al., Appellees.

Be it remembered, that on the 4th day of June, 1914, there were filed in the office of the clerk of the Supreme Court of the State of Kansas, a Certified Copy of Notice of Appeal and Proof of Service thereof, and a certified copy of Journal Entry of Judgment rendered in the court below, which Notice of Appeal, Proof of Service, and Journal Entry of Judgment are in words and figures as follows to-wit:

2 Filed Jun- 4, 1914. D. A. Valentine, Clerk Supreme Court.

In the District Court of Jackson County, Kansas.

No. 19549.

No. 5398.

B. O. McClain, Plaintiff,

vs.

Robert Miller et al., Defendants.

Notice of Appeal.

To Robert Miller and Wm. Cooney, defendants, and Crane & Woodburn Bros., their attorneys of record in the above action:

You are hereby noticed that the plaintiff appeals from the order and judgment of the District Court made on the 5th day of May, 1914, sustaining the motion of defendants for a new trial in said action, and granting and ordering a new trial therein.

M. A. BENDER,
Attorney for Plaintiff.

Acknowledgment of Service.

Service of the above notice is hereby acknowledged this 19th day of May, 1914.

CRANE & WOODBURN BROS.,
Attorneys for Defendants.

Endorsements: No. 5398. Notice of Appeal. B. O. McClain vs. Robert Miller, et al. Filed this day May 19th, 1914. L. M. Thompson, Clerk District Court.

3 In the District Court of Jackson County, Kansas.

No. 5398.

B. O. McCLAIN, Plaintiff,

vs.

ROBERT L. MILLER and WILLIAM COONEY, Defendants.

Journal Entry.

Now on this 5th day of May, A. D. 1914, the same being one of the regular May, 1914, term of said court, comes the plaintiff by M. A. Bender, his attorney, and comes also the defendants by Crane & Woodburn Bros., their attorneys, and the motion of defendant for an order granting a new trial herein, comes on for hearing at the time set therefor; after listening to the argument of counsel, and being fully advised in the premises, the court finds that error was committed by the court in the trial of said action in refusing to give the following instruction, requested by defendants to be given to the jury:

"I instruct you that under the law an Indian holding an allotment of land from the Government cannot make a valid sale of the crops grown on such allotment until after they have been severed from the land. I therefore instruct you that if at the time it is claimed by the plaintiff he purchased the corn of Mish-no, such corn was growing and not severed from the land, the attempted sale was void,"

and that the motion of the defendants for a new trial should be sustained. To which finding, the plaintiff at the time duly excepted.

It is therefore considered, ordered and adjudged by the court, that the motion of defendants be, and the same is hereby sustained, and the verdict rendered at the trial of this cause, be, and the same is hereby set aside and held for naught, and a new trial of said action is hereby ordered by reason of said error, to which judgment and order of the court the plaintiff at the time duly objected and excepted.

Thereupon this cause was continued until the next regular term of said court.

O. K.

WOODBURN.

Endorsements: No. 5398. B. O. McClain vs. Robert L. Miller, et al. Journal Entry. Filed this Day, May 5, 1914. L. M. Thompson, Clerk District Court.

4 *Certificate of Copy.*

STATE OF KANSAS,
Jackson County, ss:

I, L. M. Thompson, Clerk of the District Court of the 36th Judicial District of the State of Kansas, sitting within and for the county aforesaid do hereby certify the above and foregoing to be a true, full and complete copy, with all the endorsements thereon, of Notice of Appeal, acknowledgement of service and Journal Entry in the therein entitled cause as the same remains on file in my office.

Witness my hand and official seal, affixed at my office in Holton, this 3rd day of June, A. D. 1914.

[SEAL.] L. M. THOMPSON,
Clerk District Court.

Endorsed: Case No. 5398. B. O. McClain, Appellant, vs. Robert L. Miller and William Cooney, Appellees. Certified copy of Notice of Appeal and Journal Entry. Filed Jun- 4, 1914. D. A. Valentine, Clerk Supreme Court.

5 Be it further remembered, That on the 3d day of April, 1915, there was filed in the office of the clerk of the Supreme Court of Kansas, an abstract of the record prepared by appellant, and also thereafter, on the 11th day of May, 1915, there was filed in the office of the clerk of the Supreme Court of Kansas, a counter abstract of the appellee, which abstract and counter abstract are in words and figures as follows, to-wit:

6 Filed Apr. 3, 1915. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 19549.

B. O. McCLAIN, Appellant,

vs.

ROBERT MILLER and WILLIAM COONEY, Appellees.

Appeal from the District Court of Jackson County, Kansas.

Abstract of Appellant.

B. C. Mitchner, St. Marys, Kan.; M. A. Bender, Holton, Kan.

7 In the Supreme Court of the State of Kansas.

No. —.

B. O. McCLAIN, Appellant,

vs.

ROBERT MILLER and WILLIAM COONEY, Appellees.

Appeal from the District Court of Jackson County, Kansas.

Abstract of Appellant.

This action was tried in the District Court of Jackson County, Kansas, upon the following bill of particulars (omitting caption):

The said B. O. McClain, plaintiff, complains of the said Robert Miller, William Cooney, defendants in this the above entitled action, and shows to this court:

8 That the said plaintiff is a resident of Jackson county, in the state of Kansas, and that his correct postoffice address is Mayetta, Kansas, R. F. D. in Jackson county.

1. And for his first cause of action plaintiff says that on and before the 25th day of October, 1912, the said plaintiff was the owner of all of the following described personal property, to-wit: Fourteen acres of corn, then on the stock, on the following described land, to-wit: Section 31, southwest ¼ of northeast ¼, township 8, range 13, Jackson county, Kansas and 12½ acres of corn, then on the stalk, on the following described land, to-wit: Northeast ¼ of northeast ¼ of section 31, township 8, range 13, Jackson county, Kansas. The said corn amounting to (694) six hundred and ninety-four bushels and of the actual value of 37 cents per bushel, making a total of ($256.78) two hundred and fifty-six and 78/100 dollars.

That on or about the 25th day of October, 1912, the said defendants wrongfully and unlawfully took the said property from the possession of this plaintiff and has ever since wrongfully and unlawfully detained the same from the possession of the plaintiff.

That the said plaintiff, on the 25th day of October, 1912, was and ever since has been entitled to the possession of all of said property. Plaintiff has duly demanded said property from the defendants, which demand has been refused.

Plaintiff alleges that the said property is still wrongfully detained by the defendants. That said property was not taken in execution upon any order or judgment against the said plaintiff, or for the payment of any tax, fine or amercement assessed against him,
9 or by virtue of an order of delivery issued in a replevin suit, or any other mesne or final process issued against said plaintiff.

2. And for a second cause of action, plaintiff refers to all the above and foregoing parts of this bill of particulars, as part hereof, and alleges that he has sustained damages by reason of the unlawful detention of the said property in the sum of ($256.78) two hundred and fifty-six and 78/100 dollars.

Wherefore, for the causes aforesaid, plaintiff prays judgment against the said defendants for the recovery of the possession of said property, or for the value thereof, in the sum of $256.78, with interest thereon from the 25th day of October, 1912, at the rate of 6 per cent per annum, in case a recovery of said property cannot be had.

Plaintiff also prays judgment against said defendants for said sum of $256.78, his damage so as aforesaid sustained, with interest thereon from the 25th day of October, 1912, at the rate of 6 per cent per annum, and for the costs of this action.

B. C. MITCHNER,
Attorney for Plaintiff.

Evidence of Plaintiff.

The plaintiff's source of title to the property in controversy was based upon the following, which is on file in this cause with the clerk of the District Court:

Know all men by these presents, That in consideration of Ninety and — 100 Dollars the receipt of which is hereby acknowl-
10 edged, do grant, sell, transfer and deliver, unto B. O. McClain his heirs, executors, administrators, and assigns, the following goods and chattels, viz: ½ crop of corn and all the stocks of 28 acres in S. W. ¼ of N. E. ¼ and 25 acres in N. E. ¼ of N. E. ¼ Sec. 31, to'p 8 R. 13.

To have and to hold, all and singular, the said goods and chattels forever; and the said grantor hereby covenant with said grantee that he is the lawful owner of said goods and chattels; that they are free from all incumbrances; that he has good right to sell the same as aforesaid; and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said grantor has hereunto set his hand this 23rd day of May A. D. 1912.

his
PATRIC X MISH-NO.
mark.
B. O. McCLAIN.

Executed in Presence of

J. B. ERHBACH.
Witness to Mark.

Filed in Register of Deeds' Office May 25, 1912.

Patric Mish-no was, at all times complained of, a member of the Prairie Band of Pottawatomie Indians in Jackson county, Kansas, and that the real estate mentioned in said bill of sale was his allotment from the Government of the United States, held under a trust patent, the final patent to which was still withheld by the Government under its treaty with said Tribe. Written permission had been given by the Government to Mish-no to lease his own allot-
11 ment and had leased the same for the year 1912, and the corn purchased by appellant was the landlord Mish-no's share. The defendants severed possession of said property subsequent to the date of the bill of sale of appellant and refused to return the same or pay therefor, under demand of appellant.

Instructions of the Court, with the "Stock" Instructions Omitted.

Gentlemen of the Jury:

The plaintiff for his cause of action against defendants says that on and before October 25, 1912, plaintiff was the owner of 14 acres of corn then on stalk on section 31, of the southwest quarter of the northeast quarter in township 8 of range 13, in Jackson county, and 12½ acres of corn then on stalk on northeast quarter of section 31, township 8, of range 13, in said county. The corn amounting to 694 bushels of the value of 37 cents per bushel, or $256.78, and that on or about October 25, 1912, defendants wrongfully and unlawfully took said property from the possession of plaintiff and has ever since wrongfully and unlawfully detained the same from the possession of plaintiff, and that plaintiff on October 25, 1912, was and ever since has been entitled to the possession of such property and that he has duly demanded the property from defendants, which demand was refused, and that said property is still wrongfully detained by defendants.

Plaintiff for his second cause of action against defendants
12 alleges that he has sustained damages by reason of the unlawful detention of said property in the sum of $256.78.

The defendants deny the claim of plaintiff.

No. 6.

The statutes of Kansas provide as follows:

"Every sale or conveyance of personal property unaccompanied by an actual and continued change of possession shall be deemed to be void as against purchasers without notice and existing or subsequent creditors until it is shown that such sale was made in good faith and upon a sufficient consideration. This section shall not interfere with the provisions of the law relating to chattel mortgages."

You are therefore instructed that unless you find from a preponderance of the evidence in this case that the claimed sale to B. O. McClain by Mish-no was made in good faith and upon a sufficient consideration, such sale is void, unless you further find that the plaintiff B. O. McClain, at the time of the claimed sale, took and retained the actual possession of said corn prior to the recording of the mortgage to Cooney.

Where it appears that a sale is made in good faith upon sufficient consideration, though unaccompanied by a change of possession, the mere fact that a subsequent mortgagee is ignorant of the sale will not avoid it in his favor.

13 No. 7.

You are further instructed that under the pleadings and evidence in this case if you find that the claimed bill of sale in this case was a mortgage and was intended to secure certain money advanced by B. O. McClain to Mish-no, you will find for the defendants.

No. 8.

Unless you believe from a preponderance of the evidence that the Indian, Mish-no, or Mazh-no, signed the bill of sale with the understanding and intention that he was selling the corn to the plaintiff and passing a full and complete title thereto to the plaintiff, then you must find for the defendants.

No. 9.

A bill of sale is not necessary to pass the title to personal property from the vendor to the vendee.

No. 10.

You are further instructed that if you find for the plaintiff in this case, his measure of damages should be the value of the corn per bushel standing in the field at the time and place of its alleged conversion.

OSCAR RAINES, *Judge.*

Defendants requested the following instruction:

14 I instruct you that under the law an Indian holding an allotment of land from the Government cannot make a valid sale of the crops grown on such allotment until they have been

severed from the land. I therefore instruct you that if at the time it is claimed by the plaintiff he purchased the corn of Mish-no, such corn was growing and not severed from the land, the attempted sale was void.

Refused and excepted to.

OSCAR RAINES, *Judge.*

The jury returns the following verdict:

Verdict.

We, the jury impaneled and sworn in the above entitled case, do upon our oath find for the plaintiff B. O. McClain, and assess the amount of his recovery at $222.15.

PHILIP FRICKER, *Foreman.*

Journal Entry.

(Caption omitted.)

Now on this 13th day of May, 1913, comes the plaintiff B. O. McClain, by his attorney, M. A. Bender, and the defendants by their attorneys, Crane & Woodburn Bros., and thereupon this cause comes on for trial before a jury composed of twelve good and lawful men of the body of Jackson county.

The plaintiff thereupon offered his evidence and rested his case. The defendants then offered their evidence and rested their case. The plaintiff thereupon offered his rebuttal testimony and rested his case.

15 And thereupon the court instructed the jury in writing and the jury, after listening to the argument of counsel, and being fully advised in the matter, retired to consider of their verdict.

After being out for some time they duly returned into court their verdict, which is in words and figures as follows:

(Verdict as above.)

And thereupon the defendants gave notice of a motion for a new trial and the rendition of the judgment was deferred by the court until after the hearing of said motion.

Motion for New Trial.

(Filed May 14, 1913.)

(Caption omitted.)

Now comes said Wm. Cooney and Robert Miller and move the court to vacate the verdict returned by the jury in this action on the

13th day of May, A. D. 1913, and to grant said Wm. Cooney and Robert Miller a new trial of this action for the following causes which affect materially their substantial rights, to-wit:

First. Abuse of discretion by the jury.

Second. Misconduct of the jury.

Third. Misconduct of the prevailing party.

Fourth. Accident and surprise which ordinary prudence could not have guarded against.

Fifth. The defendants were not afforded a reasonable opportunity to present his evidence and be heard on the merits of the case.

16 Sixth. Erroneous rulings of the court.

Seventh. Erroneous instructions given by the court.

Eighth. The verdict was given under the influence of passion and prejudice.

Ninth. The verdict is in whole or in part contrary to the evidence.

Tenth. Newly discovered evidence, material for said defendants, and which they could not, with reasonable diligence, have discovered and produced at the trial.

Eleventh. Because the court refused to give instructions requested.

CRANE & WOODBURN BROS.,
Attorneys for Defendants.

Journal Entry.

(Caption omitted.)

Now on this 5th day of May, A. D. 1914, the same being one of the days of the regular May, 1914, term of said court, comes the plaintiff by M. A. Bender, his attorney, and come also the defendants by Crane & Woodburn Bros., their attorneys, and the motion of defendant for an order granting a new trial herein comes on for hearing at the time set therefor; after listening to the argument of counsel, and being fully advised in the premises, the court finds that error was committed by the court in the trial of said action in refusing to give the following instruction, requested by defendants, to be given to the jury:

17 "I instruct you that under the law an Indian holding an allotment of land from the Government cannot make a valid sale of the crops grown on such allotment until after they have been severed from the land. I therefore instruct you that if at the time it is claimed by the plaintiff he purchased the corn of Mish-no, such corn was growing and not severed from the land, the attempted sale was void," and that the motion of the defendants for a new trial should be sustained. To which finding the plaintiff at the time duly excepted.

It is therefore considered, ordered and adjudged by the court that the motion of defendant be, and the same is hereby sustained, and the verdict rendered at the trial of this cause be, and the same is hereby set aside and held for naught, and a new trial of said action is hereby ordered by reason of said error to which judgment

and order of the court the plaintiff at the time duly objected and excepted.

Thereupon this cause was continued until the next regular term of said court.

In the District Court of Jackson County, Kansas.

Case No. 5398.

B. O. McCLAIN, Plaintiff,

vs.

ROBERT MILLER et al., Defendants

Notice of Appeal.

To Robert Miller and Wm. Cooney, defendants and Crane & Woodburn Bros., their attorneys of record in the above action

18 You are hereby notified that the plaintiff appeals from the order and judgment of the District Court made on the 5th day of May, 1914, sustaining the motion of defendants for a new trial in said action, and granting and ordering a new trial therein.

M. A. BENDER
Attorney for Plaintiff.

Acknowledgment of Service.

Service of the above notice is hereby acknowledged this 19th day of May, 1914.

CRANE & WOODBURN BROS.,
Attorneys for Defendants.

19 *Assignment of Errors.*

First. The court erred in sustaining the motion of the defendants below for a new trial.

Second. The court erred in finding that the instruction requested by appellees as set out in the journal entry of May 5, 1914, should have been given to the jury upon the trial of said cause.

Third. The court erred in setting aside and holding for naught the verdict of the jury rendered in this cause.

B. C. MITCHNER AND
M. A. BENDER,
Attorneys for Appellant.

20 Filed May 11, 1915. D. A. Valentine, Clerk Supreme Court.

19549.

In the Supreme Court of the State of Kansas.

No. —.

B. O. McLain, Appellant,

vs.

Robert Miller and Wm. Cooney, Appellees.

Appeal from Jackson County.

Hon. Oscar Raines, Trial Judge.

Counter Abstract of Appellees.

F. T. Woodburn, Holton, Kansas; E. D. Woodburn, Holton, Kansas; A. E. Crane, Atchison, Kansas, Attorneys for Appellees.

21 In the Supreme Court of the State of Kansas.

No. —.

B. O. McLain, Appellant,

vs.

Robert Miller and Wm. Cooney, Appellees.

Abstract of Appellees.

Evidence of Appellees.

Upon the trial it was admitted that the land upon which the corn in question was growing on May 23, 1912, was the allotment of Mish-no, a member of the Prairie Band of Pottawatomie Indians of Jackson county Kansas, and that he had received the allotment of land under the provisions of the Act of Congress of February 8, 1887.

It was further admitted that the patent upon which Mish-no held the land contained the restrictions provided for in the aforesaid Act of Congress. It was undisputed at the trial that Mish-no sold the corn to Wm. Cooney and delivered it to him after it
22 was mature and severed from the land, and he sold the land to the defendant Robert Miller, who bought it from Cooney and paid him for it.

We hereby certify that the foregoing is true and correct abstract of a portion of the evidence in the above entitled case.

E. T. WOODBURN.
E. D. WOODBURN.
A. E. CRANE.
Attorneys for Appellees.

23 Be it further remembered, That on Wednesday the 5th day of May, 1915, the same being one of the regular judicial days of the January Term, 1915, of the Supreme Court of the State of Kansas, before the said Court in session at its court room in the city of Topeka, the following proceeding, among others was had, and entered of record in the words and figures as follows, to-wit:

24 In the Supreme Court of the State of Kansas, Wednesday, May 5, 1916.

No. 19549

B. O. McCLAIN, Appellant,

vs.

ROBERT L. MILLER et al., Appellees.

Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of the district court of Jackson county; thereupon said cause is submitted on brief of counsel for both parties and taken under advisement by the court. Appellees allowed until Tuesday the 11th day of May within which to serve and file brief.

25 And afterwards, on Saturday the 12th day of June, 1915, the same being one of the regular judicial days of the January Term 1915 of the Supreme Court of the State of Kansas before said court in session at its court room in the City of Topeka, the following proceeding, among others, was had and entered of record in the words and figures as follows, to-wit —

26 In the Supreme Court of the State of Kansas, Saturday, June 12th, 1915.

No. 19549.

B. O. McCLAIN, Appellant,

vs.

ROBERT MILLER et al., Appellees.

Journal Entry of Judgment.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be reversed, and that this cause be remanded with directions to the court below to enter judgment on the verdict. It is further ordered that the appellees pay the costs of this case in this court taxed at $—, and hereof let execution issue.

27 And also, on the same day, the 12th day of June, 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Court's written opinion, together with the syllabus thereto, which opinion and syllabus are in the words and figures as follows, to-wit:—

28 No. 19549.

B. O. McCLAIN, Appellant,

v.

ROBERT MILLER and WILLIAM COONEY, Appellees.

Appeal from Jackson County.

Reversed.

Syllabus by the Court.

MARSHALL, *J.*:

A member of the Prairie Band of Pottawatomie Indians can sell the corn growing on the land allotted to him by the government, and the contract of sale is not a contract touching the land or any interest therein.

All the justices concurring.

A true copy.
Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

29 No. 19549.

The opinion of the court was delivered by

MARSHALL, *J.*:

This is an appeal from a judgment granting a new trial. Patrick Mish-no, a member of the Prairie Band of Pottawatomie Indians in Jackson county, Kansas, was allotted certain lands by the government, and held the same under a trust patent. Written permission was given him by the government to lease his allotment. This he did, for crop rent, for the year 1912. Afterwards, on May 23, 1912, he sold his one-half of the crop to the plaintiff, B. O. McClain. Later, Mish-no sold the corn to defendant Cooney, and delivered the corn to him after it was severed from the land. Cooney then sold the corn to defendant Miller. The defendants, Miller and Cooney, refused to deliver the corn to the plaintiff or to pay the plaintiff for it. The court granted a new trial because it had refused to give the instruction requested by the defendants, as follows:

"I instruct you that under the law an Indian holding an allotment of land from the Government cannot make a valid sale of the crops grown on such allotment until after they have been severed from the land. I therefore instruct you that if at the time it is claimed by the plaintiff he purchased the corn of Mish-no, such corn was growing and not severed from the land, the attempted sale was void."

The federal statute governing the right of Mish-no to sell his growing corn, if there is any statute on the subject, is as follows:

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, 30 discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." (24 U. S. Stat. at Large, ch. 119, Sec. 5, p. 389.)

Was the corn, when it was sold to the plaintiff, real or personal property? If it was real property, the judgment must be affirmed, but if it was personal property, it must be reversed.

It is argued first, that growing crops are a part of the realty. Under some conditions, this is true; and under others, it is not true. The defendants contend that, as between vendor and vendee, the sale of

land carries with it all growing crops, unless there is a reservation of such crops. Concerning this there is no ground for dispute.

(Smith v. Hague, 25 Kan. 246;
Babcock v. Dieter, 30 Kan. 172, 2 Pac. 504;
Chapman v. Veach, 32 Kan. 167, 170, 4 Pac. 100;
Garantlo v. Cooley, 33 Kan. 137, 5 Pac. 766;
Beckman v. Sikes, 35 Kan. 120, 123, 10 Pac. 592;
Goodwin v. Smith, 49 Kan. 351, 31 Pac. 153;
Polley v. Johnson, 52 Kan. 478, 482, 35 Pac. 8;
National Bank v. Beegle, 52 Kan. 709, 35 Pac. 814).

It is also argued, that by a sale of growing crops, license is given to enter on the land and sever and take the crops away when mature. This is the established law.

The defendants' argument must fail, unless growing crops are a part of the land on which they are growing. This question has been disposed of by this court, and we think by the supreme court of the United States. In Maley v. Harp, 53 Kan. 398; 36 Pac. 743, this court said:

"Annual crops, like wheat, which are the product of industry and care, sown by the owner of the soil or his tenant, while growing and immature, are personal property." (Syl. par. 1.)

(See, also, Caldwell v. Custard, 7 Kan. 303, 307; and Polley v. Johnson, supra.) In Briggs v. United States, 143 U. S. 346,
31 36 L. Ed. 180, 184, it was held that a sale of cotton already planted takes effect the moment the crop appears, and that delivery of the crop is not essential to the title. For the purpose of improving arable land, an Indian may cut timber from his allotment, and, after the timber is severed, sell it. (United States v. Paine Lumber Co., 206 U. S. 467, 51 L. Ed. 1139.)

"The great weight of authority is to the effect that annual crops, raised by yearly labor and cultivation, are, although unsevered from the soil, to be regarded as personal chattels and capable of being sold by oral contract, without regard to whether the crops are growing or matured." (Note, 23 L. R. A. (N. S.) 1219.) See also, exhaustive note on "Sale or mortgage of future crops," in 23 L. R. A. 449-477.

It is argued that because an Indian allottee is unable to lease his allotment without permission from the government, and because a verbal sublease by the lessee of the Indian is void, it follows that the Indian can not sell his share of the crops growing on the allotment. The weakness of this argument is, that the purchaser from the Indian is not a lessee. If his purchase is void, it is not because he has leased the land or any part thereof or interest therein.

We must conclude that Mish-no had the right to sell his share of the corn growing on his allotment. It follows that the trial court erred in granting a new trial for failure to give the instruction requested. The judgment is reversed, and the district court is directed to enter judgment on the verdict.

All the Justices concurring.

A true copy.
Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

[Endorsed:] No. 5398. 19549. B. O. McClain vs. Robert Miller et al. Syllabus from Supreme Court. Filed this day, Jul- 5, 1915. L. M. Thompson, Clerk District Court.

32 SUPREME COURT OF KANSAS, *ss:*

I, D. A. Valentine, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to —, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of B. O. McClain, Appellant, vs. Robert Miller and William Cooney, Appellees, and also of the opinion of the court rendered therein, as the same are now of record and remain on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas this April 6th, 1916.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

33 Here follow

The Original Petition for Writ of Error, with the allowance thereof, and the Assignments of Error.

The Original Writ of Error and copy of the Bond for Appeal and Supersedeas.

The original Citation, together with the acknowledgment of its service.

34 In the Supreme Court of the State of Kansas,

No. 19549.

B. O. McCLAIN, Plaintiff and Appellant,

v.

ROBERT MILLER and WILLIAM COONEY, Defendants and Appellees.

Petition for Writ of Error.

Assignment of Errors and Prayer.

Considering themselves aggrieved by the final decision of the Supreme Court of Kansas in rendering judgment against them in the

above entitled and numbered action, on the 12th day of June, 1915, the defendants and appellees hereby pray a writ of error from the said decision and judgment to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond.

And the said Robert Miller and William Cooney assign the following errors in the records and proceedings of the said case:

The Supreme Court of Kansas erred in holding and deciding a member of the Prairie Band of Pottowatomi Indians can sell the corn growing on the land allotted to him by the government, and the contract of sale is not a contract touching the land or any interest therein.

The said errors are more particularly set forth as follows: The Supreme Court of Kansas erred in holding and deciding—

First. That growing crops, growing on land allotted to an Indian under the provisions of the Act of Congress of February 8, 1887, are not a part of the real estate so that an attempted sale of such crops is void under that statute.

Second. That, an Indian owning immature crops growing on land allotted to him under the provisions of the Act of Congress approved February 8, 1887, can sell such growing and immature crops, and pass good title thereto regardless of such Act of Congress.

Third. That the trial court did not err in refusing to give to the jury on the trial of the case the instruction requested by defendants to-wit:

"I instruct you that under the law an Indian holding an allotment of land from the government cannot make a valid sale of the crops grown on such allotment until after they have been severed from the land. I therefore instruct you that, if at the time it is claimed by the plaintiff he purchased the corn of Mish-no such corn was growing and not severed from the land, the attempted sale was void."

For which errors the defendants, Robert Miller and William Cooney, pray that the said judgment of the Supreme Court of the State of Kansas, dated June 12, 1915, be reversed and a judgment rendered in favor of these defendants and appellees, and for costs.

A. E. CRANE,
E. D. WOODBURN AND
F. T. WOODBURN,
Attorneys for Robert Miller and William Cooney.

STATE OF KANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Robert Miller and William Cooney, in the sum of $1,000.00 dollars; such bond when approved to act as a supersedeas.

Dated March 22d, 1916.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Endorsed:] 19549. B. O. McClain, appellant, vs. Robert L. Miller et al., appellees. Petitioner for Writ of Error & Assignment of Errors. Filed Mar. 22, 1916. D. A. Valentine, Clerk Supreme Court.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Justices of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a plea which is in the said Supreme Court of the State of Kansas, before you, or some of you, being the highest court of law or equity of said state in which a decision can be had in said suit, at the January Term, 1915, thereof, between B. O. McClain, Appellant, and Robert Miller and William Cooney, Appellees, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right and title set up and claimed under such Statute, a manifest error hath happened to the great damage of said Robert Miller and William Cooney as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this Writ, so that you have the said record and proceedings aforesaid at the city of Washington, and filed in the office of the clerk of the Supreme Court of the United States of America, on or before Thirty days from the date hereof, to the end that the record and the proceedings aforesaid, being inspected, the Supreme Court of the United States of America may cause further to be done therein to correct that error, whatever of right and according to the laws and customs of the United States should be done.

37 Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 22nd day of March in the Year of Our Lord, Nineteen Hundred and Sixteen.

Issued at the office in the city of Topeka, with the seal of the District Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

[Seal of District Court, U. S., District of Kansas, 1861.]

MORTON ALBOUGH,
Clerk District Court of the United States, First Division of the Judicial District of Kansas.

Allowed:
W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] 19549. Filed Mar. 22, 1916. D. A. Valentine, Clerk Supreme Court.

38 Know all Men by these Presents That we, Robert Miller and William Cooney, as principals, and W. A. Cooney and S. E. Cathcart as sureties, are held and firmly bound unto B. C. McClain in the full and just sum of One Thousand Dollars to be paid to the said B. O. McClain, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 22d day of March, 1916.

Whereas, lately at the January term, A. D. 1915, of the Supreme Court of the State of Kansas in a suit pending in said Court between B. O. McClain plaintiff and appellant, and Robert Miller and William Cooney, defendants and appellees, judgment was rendered against the said Robert Miller and William Cooney, and the said Robert Miller and William Cooney have obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said B. O. McClain citing and admonishing him to be and appear in the Supreme Court of the United States *sixty* thirty days after the date of said citation:

Now, the condition of the above obligation is such, that if the said Robert Miller and William Cooney shall prosecute said writ *in* error and proceeding to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

ROBERT MILLER.
By F. T. WOODBURN,
His Attorney.
WILLIAM COONEY.
W. A. COONEY.
S. E. CATHCART.

STATE OF KANSAS,
Jackson County, ss:

We, the undersigned, sureties on the above bond, being each first duly sworn, on oath say that we are citizens of the State of Kansas and are each worth the sum of $800.00 over and above all our debts, liabilities and exemptions, and that we are the owners of real estate within the State of Kansas. So help us God.

W. A. COONEY.
S. E. CATHCART.

Subscribed and sworn to before me this 22 day of March, 1916.
[SEAL.] H. D. JONES,
Notary Public.

Term expires July 23, 1916.

Approved by
W. A. JOHNSTON,
Chief Justice.

Filed M'ch 22, 1916. D. A. Valentine, Clerk Supreme Court.

39 19549.

The United States of America to B. O. McClain, Greeting:

You are hereby cited and admonished to be, and appear in the Supreme Court of the United States of America, at the City of Washington, D. C., Sixty days from and after the day this citation bears date, pursuant to the Writ of Error filed in the clerk's office of the Supreme Court of the State of Kansas, wherein B. O. McClain is Appellant and Robert Miller and William Cooney are appellees, and you are cited and admonished to show cause, if any there be, why the judgment rendered against the said Robert Miller and William Cooney as in said writ mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, this 22nd day of March, A. D. 1916.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

A true Copy.
Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

I hereby acknowledge due service of the above citation, this 24th day of March, 1916.

M. A. BENDER,
Attorney of Record for the Above Named Appellant B. O. McClain.

[Endorsed] 19549. Filed Mar. 25, 1916. D. A. Valentine, Clerk Supreme Court.

40 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on March — 1916, in the matter of B. O. McClain versus Robert Miller and William Cooney:

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth.—one for the defendant, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Topeka, Kansas, this April 6th, 1916.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

41 STATE OF KANSAS,
Supreme Court, ss:

No. 19549.

B. O. McCLAIN, Appellant,

vs.

ROBERT L. MILLER et al., Appellees.

In obedience to the command of the Writ of Error issued from the Supreme Court of the United States of America, in the above entitled cause, I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas do herewith transmit to the said Supreme Court of the United States of America a duly certified transcript of the record and proceedings of the Supreme Court of the State of Kansas in the said above entitled cause, with all things concerning the same.

In witness whereof, I have hereunto set my hand and caused the official seal of the Supreme Court of the State of Kansas to be hereto affixed at my office in the City of Topeka, State of Kansas, this 6th day of April, A. D. 1916.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE.
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 25,236. Kansas Supreme Court. Term No. 446. Robert Miller and William Cooney, plaintiffs in error, vs. B. O. McClain. Filed April 11th, 1916. File No. 25,236.

JAN 24 1916
JAMES D. MAHER,
CLERK.

BRIEF OF APPELLANTS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 446 [illegible]519

ROBERT MILLER AND WILLIAM COONEY, PLAINTIFFS IN ERROR,

vs.

B. O. McCLAIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Filed April 11, 1916.

(25,236)

(25,236)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 446

ROBERT MILLER AND WILLIAM COONEY, PLAINTIFFS IN ERROR,

vs.

B. O. McCLAIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT OF FACTS.

B. O. McClain, plaintiff in the trial court, claimed that on the 23rd day of May, 1912, he purchased of Patrick Mishno, a member of the Prairie Band of Pottawatomie Indians, one half of the corn and all of the stalks on twenty-eight acres of land in the southwest quarter (S. W. 1/4) of the northeast quarter (N. E. 1/4) and twenty-five acres in the northeast quarter (N. E. 1/4) of the northeast quarter (N. E. 1/4) of section thirty-one (31) in township eight (8) of range thirteen (13) in Jackson County, Kansas, and that at the time of the purchase he took a bill of sale from Mish-no, which he filed with the

register of deeds in the manner required by the laws of Kansas for the filing of chattel mortgages. The land above described had been allotted to Mish-no in 1893, under the act of Congress of Febuary 8, 1887. At the time of the claimed sale of the corn to plaintiff, the land was still held by the United States in trust for Mish-no under the provision of said act of Congress.

Upon the trial the Indian and the plaintiffs in error, defendants below, claimed that no sale of the corn was made by Mish-no to McClain. It was also claimed by the plaintiffs in error that if the Indian had bargained for the corn in question, such sale was void under the provisions of said act of Congress.

The defendant, Cooney, bought the corn of the Indian in the autumn of 1912, and delivered it to the defendant, Robert Miller, and it was claimed that by the sale and delivery of the corn by Mish-no when it was mature and severed from the soil, they got good title.

Upon the trial of the cause, which was had to a jury, the defendants requested the court to instruct the jury as follows:

> "I instruct you that under the law an Indian holding an allotment of land from the Government cannot make a valid sale of the crops grown on such allotment until they have been severed from the land. I therefore instruct you that if at the time it is claimed by the plaintiff he purchased the corn of Mish-no such corn was growing and not severed from the land, the attempted sale was void."

The court refused to give the instruction requested, but instructed that if the plaintiff, McClain, purchased the corn as claimed in May, 1912, then the verdict should be for him, and against the defendant. The jury found for the plaintiff and the defendants moved for a new trial upon the hearing of which motion the trial court became convinced that his refusal of the instruction requested was erroneous and granted a new trial. From this ruling the plaintiff appealed to the Supreme Court of Kansas, where the ruling of the trial court granting a new trial was reversed, and a mandate issued to the trial court to set aside its order granting a new trial and to enter judgment in favor of the plaintiff and against the defendant upon the verdict of the jury, from which decision of the Supreme Court of Kansas, the plaintiffs in error prosecute this proceeding in error to reverse the decision of the Supreme Court of Kansas.

ASSIGNMENT OF ERROR.

It is claimed by the plaintiffs in error that the judgment from which this proceeding in error is prosecuted was erroneous in the following particulars, to wit:

I. That the trial court erred in refusing to give the instruction set out in the foregoing statement of facts.

II. That the Supreme Court of the State of Kansas erred in reversing the order of the trial court, granting a new trial of the cause, and in directing the trial court to enter judgment for the plaintiff and against the defendant upon the verdict of the jury.

III. That the Supreme Court of the State of Kansas erred in its construction of section 5 of the act of Congress approved February 8, 1887, in holding that under said act an Indian allottee of land which is then held in trust by the Government can make a lawful sale of growing crops on the allotment.

BRIEF OF ARGUMENT.

The litigation in this case involves the construction of the act of Congress approved February 8, 1887, providing for the allotment in severalty of Indian land and the issuance to the allottee of trust patents therefor. The particular section of said act, the construction of which is involved in this controversy, is section five, and reads as follows:

> "Section 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotments have been made, or in case of his decease, to his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: Provided, that the President of the United States may in any case, in his discretion, extend the period.
>
> "And if any conveyance shall be made of the lands set

apart and allotted as herein provided, OR ANY CONTRACT TOUCHING THE SAME, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Plaintiffs in error claim that under the foregoing section of the act of Congress, the pretended sale of the growing corn made by Mish-no, the Indian allottee, to the plaintiff, in the month of May, shortly after the corn was planted, and while it was still growing, was void because it was an attempted conveyance of an interest in the land set apart and allotted to the Indian and was a contract touching the same while the title to the land was still in the United States and held in trust for the allottee. They contend that this must be the correct view if such holding in trust is to benefit the Indian as contemplated by Congress when passing the act, and this particular case is an aggravated instance of the result that would follow from any other holding. The plaintiff claims to have purchased the corn in May for less than $50.00, and from such purchase, without any further action on his part, to be entitled to nearly $300 from the defendants, after the defendants had purchased the matured and severed corn and paid the Indian the value of such matured corn. It is the law of Kansas and we believe the universal rule in this country that growing immature corn is a part of the realty to the extent that it will pass to a purchaser under a deed conveying the real estate without a reservation of the growing crop.

> "It has been clearly settled in this State that a conveyance of land, either by voluntary deed or judicial sale, without reservation, carries all growing crops with the title to the land. This rule only applies to crops which are immature and have not ceased to draw sustenance from the soil at the time of the sale, and is not applicable to crops that are ripe and ready for harvest. This distinction has been carefully recognized in all the cases where the subject has been considered. When the crops mature they can no longer be regarded as part of the realty and hence do not pass to the purchaser of the land."
>
> *First National Bank v. Breglo*, 52 Kan. 709.

The same proposition is declared in Washburn on Real Prop-

erty (68 Ed.), par. 11, and in the following among other judicial decisions:

Smith v. Price, 39 Ill. 28.
Bradner v. Falkner, 34 N. Y. 347.
Banta v. Merchant, 173 N. Y. 192.

In the last cited case it is said:

> "By the agreement between the plaintiff and Mrs. Ricks, the former became a tenant in common with the latter in the crop of rye (*Harris v. Frink*, 49 N. Y. 24; *DeMott v. Hagerman*, 8 Cow. 220.) And if it had been harvested before the partition sale took place no question could have arisen as to the plaintiff's right to the share claimed, but owing to the peculiar nature and legal character of growing crops, the plaintiff's title to any share of the rye would be lost by the sale of the land under circumstances which would vest in the purchaser, the paramount title. This would have been the result under a sale in foreclosure. (*Battermann v. Albright*, 122 N. Y. 484; *Lane v. King*, 3 Wend. 584; *Shepard v. Philbrick*, 2 Denio, 174.) And a sale in partition must have the same effect. The reason for the rule rests upon the principle that growing crops form a part of the real estate, and pass by a conveyance thereof unless a constructive severance of the crop has been made. (*Harris v. Frink*, 49 N. Y. 27; *Sexton v. Breeves*, 135 N. Y. 387.)"

The case from which the foregoing citation is made states our contention exactly, that is, that growing crops form a part of the real estate until severed therefrom either actually or constructively, and that a constructive severance can only be effected by some active means, such as selling the crop, and that the very act of selling the crop and thus creating a constructive severance is the making of a contract touching the land and is absolutely void under the provisions of the aforesaid section 5.

The courts have repeatedly held that where an Indian allottee attempts to lease his land without the approval of the Secretary of the Interior, the lease is void. It is the claim of the plaintiffs in error, that the purchase of crops in the springtime, before they are mature, of necessity gives the purchaser an interest in the land. The crops must be grown and matured before they are of any value to the purchaser. The purchaser

must have the use of the land during the crop season to make his purchase of any value to him. Of necessity he must have the right to cultivate the crops and harvest the same. If a crop can be sold which is growing on an Indian allotment in the springtime, section 5 of the act of Congress of February 8, 1887, would be of little value to the Indian allottee. In that way the act of Congress passed for the protection of the Indian allottee could be evaded. This case was appealed to this Court for the purpose of finding out whether or not section 5 of the act of Congress of February, 1887, can be evaded and made of no force and effect. If the decision of the Supreme Court of Kansas stands in this case, any person desiring to raise crops on an Indian allotment can do so without procuring a lease approved by the Secretary of the Interior, by simply having a crop planted and then purchasing it.

In 3 Washburn on Real Property, 367, the author says:

> "But although a sale of growing crops under actual cultivation not yet mature, would seem to carry with it an interest in land since crops must stand and draw nutriment from the soil until it shall have grown and matured for the harvest, the cases appear to be quite uniform in holding that the property in the crop would pass with a license to enter and sever the same."

The foregoing authority states our position exactly and sets out our claims in full, with the execption that the purchaser of the crop must necessarily have the right to cultivate the same until it is mature. If by the sale of such a crop, the purchaser has the right to the use of the soil to grow the crop, the right to enter and cultivate the land and to enter and sever the crop when matured, these things would constitute an interest in the land, and would be a violation of section 5 of the act of Congress of February 8, 1887.

Wherefore the plaintiffs in error pray that the decision and judgment of the Supreme Court of the State of Kansas be reversed, and that said court be directed to sustain the judgment of the District Court of Jackson County, Kansas.

A. E. CRANE,
Topeka, Kansas,
E. D. WOODBURN,
Holton, Kansas,
Attorneys for Plaintiffs in Error.

FILED
APR 9 1918
JAMES D. MAHER,
CLERK.

BRIEF OF APPELLEES.

Supreme Court of the United States.

October Term, 1916.

No. [redacted]145 19

Robert Miller and William Cooney, Plaintiffs in Error,

vs.

B. O. McClain.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Filed April 11, 1916.

(25,236)

HALL LITHO. CO. TOPEKA 81770

No. 446.

Robert Miller and William Cooney, Plaintiffs in Error,

vs.

B. O. McClain.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Filed April 11, 1916.

(25,236)

STATEMENT OF FACTS.

The appellant B. O. McClain, on May 23, 1912, purchased from Patrick Mish-no, an Indian and a member of the Prairie Band of Pottawatomie Indians, in Jackson County, Kansas, the growing corn of the said Mish-no, on twenty-eight acres in the southwest corner of the northeast quarter, and twenty-five acres in the northeast quarter of the northeast quarter, all of section 31, township 8, range 13, Jackson County, Kansas, and took a bill of sale therefor.

Prior to this time the said Mish-no had leased his land above described for grain rent. The said

Mish-no received as the landlord's share one-half of the corn, and this was the interest sold to appellee, as above stated; that the Indian, Mish-no, had been given written permission by the Government to lease and manage his own land at the time of making said lease. The appellant thereafter took a mortgage from said Mish-no on the same corn and some additional, and by reason thereof secured the possession of all of said corn at the harvest time. The only question to be considered by the court in this appeal is whether or not the restrictions placed upon the Indian by the United States Government were such that he could not, without the consent of the Government, sell his unmatured corn crop.

The trial of the case in the court below resulted in a verdict for appellee in the sum of two hundred twenty-two and 15/100 Dollars. The defendant below filed a motion for a new trial. Upon the hearing of such motion the court granted a new trial on the ground that error was committed by the trial court in refusing to give the following instruction requested by the appellant:

"I instruct you that under the law an Indian holding an allotment of land from the Government cannot make a valid sale of the crops grown on such allotment until they have been severed from

the land. I therefore instruct you that if at the time it is claimed by the plaintiff he purchased the corn of Mish-no, such corn was growing and not severed from the land, the attempted sale was void."

The appellees appealed from the order of the District Court granting a new trial to the Supreme Court of Kansas. The Supreme Court of Kansas reversed the trial court and directed it to enter judgment for the plaintiff and against the defendant upon the verdict of the jury. Whereupon the appellants bring the case to this court.

ASSIGNMENT OF ERROR.

It is claimed by the plaintiffs in error that the judgment from which this proceeding in error is prosecuted was erroneous in the following particulars, to wit:

I. That the trial court erred in refusing to give the instruction set out in the foregoing statement of facts.

II. That the Supreme Court of the State of Kansas erred in reversing the order of the trial court, granting a new trial of the cause, and in directing the trial court to enter judgment for the plaintiff

and against the defendant upon the verdict of the jury.

III. That the Supreme Court of the State of Kansas erred in its construction of section 5 of the act of Congress approved February 8, 1887, in holding that under said act an Indian allottee of land which is then held in trust by the Government can make a lawful sale of growing crops on the allotment.

BRIEF AND ARGUMENT.

It is contended by the plaintiff in error that section 5 of the act of Congress approved February 8, 1887, prohibited Mish-no, who is a member of an Indian tribe, from disposing of the growing crop and has set out in his brief a copy of said section. We are also setting it out here so that the court may have it handily before it.

"Section 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotments have been made, or in case of his decease, to his heirs according to the laws of the

state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: Provided, that the President of the United States may in any case, in his discretion, extend the period.

"And if any conveyance shall be made of the lands set apart and allotted as herein provided, OR ANY CONTRACT TOUCHING THE SAME, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

The whole tenor of plaintiff's brief is that this growing crop was in fact '*fructus naturales*,' therefore a part of the real estate, and that Mishno was prohibited by said section 5 from disposing of it, and the real question at issue here is, Was the growing crop in fact '*fructus naturales*,' and therefore a part of the real estate, or '*fructus industriales*,' and therefore personal property? Defendant in error maintains that the crop was '*fructus industriales*,' and therefore personal property.

"At common law those products of the earth which are annual and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, termed '*emblements*' and sometimes '*fructus industriales*,' were, even while still annexed to the soil, treated as chattels with the usual incidents thereof, as to seizure on attachment during the owner's life or trans-

mission after his death. This class included grain, garden vegetables, etc. On the other hand, the fruit of trees, perennial bushes and grasses grown from perennial roots and called by way of contradistinction '*fructus naturales*,' while unsevered from the soil, considered as pertaining to the realty and as such pass to the heir after the death of the owner, but were not subject to attachment during his life."

14 *Am. & Eng. Ency. Law*, 2d Ed., p. 560.

Sparrow v. Pond, 49 Minn. 412.

Smock v. Smock, 37 Mo. 56.

Garth v. Caldwell, 72 Mo. 627.

Westbrook v. Eager, 16 N. J. Law 81.

Bloom v. Welsh, 27 N. J. Law 177.

Whipple v. Foot, 3 Am. & Dec. 442.

17 *Cyc.* 941, Sec. 3.

Vogls et al. v. Battin, 6 K. A. 742.

Polly v. Johnston, 52 Kan. 483.

Mabry v. Harp, 53 Kan. 398.

Freeman on Executions, Sec. 131.

Holt v. Holt, 57 Mo. App. 272.

Marshall v. Ferguson, 23 Cal. 65.

Davis v. McFarlane, 99 Am. Dec. 340.

Dakin v. Dakin, 103 Mich. 65.

The Supreme Court of Kansas in passing upon this case, 95 Kansas, 794, has set forth the defend-

ant in error's contention clearly and succinctly. We are therefore copying the entire opinion here which is as follows:

MARSHALL, J.: "This is an appeal from a judgment granting a new trial. Patrick Mish-no, a member of the Prairie Band of Pottawatomie Indians in Jackson County, Kansas, was allotted certain lands by the government, and held the same under a trust patent. Written permission was given him by the government to lease his allotment. This he did, for crop rent, for the year 1912. Afterwards, on May 23, 1912, he sold his one-half of the crop to the plaintiff, B. O. McClain. Later, Mish-no sold the corn to defendant Cooney, and delivered the corn to him after it was severed from the land. Cooney then sold the corn to defendant Miller. Miller and Cooney refused to deliver the corn to McClain or to pay him for it, whereupon he brought action. The jury found in his favor. The court granted a new trial because it had refused to give the instruction requested by the defendants, as follows:

"I instruct you that under the law an Indian holding an allotment of land from the Government cannot make a valid sale of the crops grown on such allotment until after they have been severed from the land. I therefore instruct you that if at the time it is claimed by the plaintiff he purchased the corn of Mish-no, such corn was growing and not severed from the land, the attempted sale was void."

The federal statute governing the right of Mish-no to sell his growing corn, if there is any statute on the subject, is as follows:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." (24 *U. S. Stat. at Large*, ch. 119, P5, p. 389.)

Was the corn, when it was sold to the plaintiff, real or personal property? If it was real property, the judgment must be affirmed, but if it was personal property, it must be reversed.

It is argued first, that growing crops are a part of the realty. Under some conditions, this is true; and under others, it is not true. The defendants contend that, as between vendor and vendee, the sale of land carries with it all growing crops, un-

less there is a reservation of such crops. Concerning this there is no ground for dispute. (*Smith v. Hague*, 25 Kan. 246; *Babcock v. Dieter*, 30 Kan. 172, 2 Pac. 504; *Chapman v. Veach*, 32 Kan. 167, 170, 4 Pac. 100; *Garonflo v. Cooley*, 33 Kan. 137, 5 Pac. 766; *Beckman v. Sikes*, 35 Kan. 351, 31 Pac. 153; *Polley v. Johnson*, 52 Kan. 478, 482, 35 Pac. 8; *National Bank v. Beegle*, 52 Kan. 709, 35 Pac. 814.) It is also argued that by a sale of growing crops license is given to enter on the land and sever and take the crops away when mature. This is the established law.

The defendants' argument must fail, unless growing crops are a part of the land on which they are growing. This question has been disposed of by this court, and we think by the Supreme Court of the United States. In *Mabry v. Harp*, 53 Kan. 398, 36 Pac. 743, this court said:

"Annual crops, like wheat, which are the product of industry and care, sown by the owner of the soil or his tenant, while growing and immature, are personal property." (Syl. P1.)

(See, also, *Caldwell v. Custard*, 7 Kan. 303, 307, and *Polley v. Johnson, supra.*)

In *Briggs v. United States*, 143 U. S. 346, 36 L. Ed. 180, 184, it was held that a sale of cotton al-

ready planted takes effect the moment the crop appears, and that delivery of the crop is not essential to the title. For the purpose of improving arable land, an Indian may cut timber from his allotment, and after the timber is severed, sell it. (*United States v. Paine Lumber Co.*, 206 U. S. 467, 51 L. Ed. 1139.)

"The great weight of authority is to the effect that annual crops, raised by yearly labor and cultivation, are, although unsevered from the soil, to be regarded as personal chattels and capable of being sold by oral contract, without regard to whether the crops are growing or matured." (Note, 23 L. R. A. n. s., 1219. See, also, exhaustive Note on "Sale or mortgage of future crops," in 23 L. R. A. 449-477.)

It is argued that because an Indian allottee is unable to lease his allotment without permission from the government, and because a verbal sublease by the lessee of the Indian is void, it follows that the Indian cannot sell his share of the crops growing on the allotment. The weakness of this argument is that the purchaser from the Indian is not a lessee. If his purchase is void it is not because he has leased the land or any part thereof or interest therein.

We must conclude that Mish-no had the right to sell his share of the corn growing on his allot-

ment. It follows that the trial court erred in granting a new trial for failure to give the instruction requested. The judgment is reversed, and the district court is directed to enter judgment on the verdict."

Under the Act of Congress referred to above, the Pottawatomie Indians were allotted the tribal lands in severalty and thereby automatically became citizens. Their land descended to them under the laws of descent and distribution of the state or territory where they were situated. The Act does not provide that the Federal Government should control the personal property belonging to the Indians; but does leave the land subject to the control thereof, or rather, the Federal Government under the Act became trustees for the allottees. If the Government had intended to reserve to itself the control over, and management of, the personal property of the Indians, then the Act of Congress found in United States Revised Statutes, Section 2104, has no force. The section reads as follows:

"No agreement shall be made by any person with any tribe of Indians or individual *not citizens of the United States* (italics ours), for the payment or delivery of any money or other thing of value in present or in prospective, or for the

granting or procuring of any privilege to him," etc.

It must be evident that Congress, in passing the Dawes Act, did so in contemplation of this provision, and if it had deemed it necessary to restrict the Indians, whom by that Act it was making citizens, in the use and control of their personal property, some provision would have been made in the Act relative thereto.

Congress has not sought in any of its Acts to change the common law rule as to the definition of personal property. All of the restrictions in the various Acts of Congress have applied solely to the real property of the Indian to whom allotments had been made, together with the control over the roads and highways of the reservations allotted, and control over moneys held in trust by the Government under its various treaties with the Indians of the several tribes.

Defendant in error contends that the growing crop of corn in controversy here, was the personal property of Mish-no and that he had a right to sell or mortgage the same. The court's attention is called to the fact that this Indian was a citizen of the United States, that he had been given permission in writing by the Government to lease

his land for the year 1912, the year this transaction occurred, and the corn purchased by the defendant in error was the rent share of such corn coming to Mish-no as landlord.

We have been unable to find any decision other than the one in this case herein set out by the Supreme Court of Kansas, involving the identical question here raised, but it seems clear from the various Acts of Congress that these Indians were left free to manage, mortgage, sell or dispose of their personal property with as much freedom as any other citizen of the land.

The defendant in error here set out in his brief to the Supreme Court of Kansas when the case was there being tried, a letter by the Assistant Commissioner of Indian Affairs, which we think is pertinent and therefore are setting it out here:

5-1100

Refer in reply to the following:

Address only the
Commissioner of Indian Affairs.

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS,

L-C
44291-14
J W W

Washington,
May 29, 1914.

Mr. M. A. Bender,
Holton, Kans.

Sir:—

The Office has your letter of May 19, 1914, regarding the right of an Indian to mortgage or transfer by bill of sale his share of the unmatured crop on his allotment.

The Office has taken the position, on the advice of a representative of the Department of Justice, that the In-

dians may lawfully mortgage crops growing on their allotments which are held in trust. This position is taken on the ground that growing crops are personal property and therefore any contract or instrument transferring an interest therein would not be a transfer of realty and not in violation of the Act of June 25, 1910 (36 Stat. L. 855). The situation would be different however, in cases of natural grass, which would be a mortgage of a portion of the realty and not a transaction in personal property.

Respectfully,
(Signed) E. B. Meritt,
Assistant Commissioner.

5-BS-27

CONCLUSION.

In the light of the decisions here cited, there can be no doubt that this growing and immature corn crop was the personal property of Mish-no, that he had a right to sell the same, that he did sell the same to the defendant in error, and no one connected with the case denies the sale, and that the decision of the Supreme Court of the State of Kansas should be sustained.

Respectfully submitted,

M. A. Bender, Holton, Kansas,

Floyd W. Hobbs, Holton, Kansas,

Robert Stone, Topeka, Kansas,

Geo. T. McDermott, Topeka, Kansas,

H. O. Caster, Topeka, Kansas,

Attorneys for Defendant in Error.